DATO' SERI ANWAR IBRAHIM *a*

v.

PP

COURT OF APPEAL, KUALA LUMPUR *b*
LAMIN MOHD YUNUS PCA
AHMAD FAIRUZ JCA
MOKHTAR SIDIN JCA
[CRIMINAL APPEAL NO: W-05-26-99 & W-05-27-99]
29 APRIL 2000 *c*

CRIMINAL LAW: *Emergency (Essential Powers) Ordinance No. 22 of 1970 - Section 2(1) - Corrupt practice by a member of the administration - Proof - Meaning of "pecuniary or other advantage" - Whether means "pecuniary and other than pecuniary advantage" - Using public position to avoid possible prosecution and embarrassment - Whether for an "advantage" - Whether charges proved - Emergency (Essential Powers) Ordinance No. 22 of 1970, ss. 2(1), 2(2)* *d*

CRIMINAL PROCEDURE: *Sentencing - Adequacy - Corrupt practice by a member of the administration - Section s. 2(1) Emergency (Essential Powers) Ordinance No. 22 of 1970 - Deputy Prime Minister using public position to avoid possible prosecution and embarrassment - Six years imprisonment - Whether excessive* *e*

CONSTITUTIONAL LAW: *Federal Constitution - Attorney General - Power to prosecute - Whether discretion of Attorney General thereof unfettered - Federal Constitution, art. 150* *f*

CONSTITUTIONAL LAW: *Federal Constitution - Emergency provisions - Annulment of - Whether required resolutions of both Houses of Parliament - Emergency (Essential Powers) Ordinance No. 22 of 1970 - Resolution to annul ordinance passed by the Lower House but yet to be laid before Upper House - Whether ordinance continued to be in force - Federal Constitution, art. 150* *g*

The appellant, the former Deputy Prime Minister and Minister of Finance Malaysia, was charged with four counts of corrupt practices under s. 2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 ('Ordinance 22'). Upon the evidence, the learned trial judge ruled *inter alia* that: (i) the appellant was the Deputy Prime Minister and Minister of Finance at the material time and was hence a 'member of the administration' within the meaning of s. 2(2) of Ordinance 22; (ii) one Azizan Abu Bakar *h* *i*

('Azizan') and Ummi Hafilda Ali ('Ummi') had made allegations of sexual misconduct and sodomy against the appellant *vide* letters P14A, B and C; (iii) the appellant had directed PW1 and PW11, who were senior special branch officers, to obtain retractions and apologies from Azizan and Ummi; (iv) Azizan and Ummi were interrogated by the special branch as a result, and coerced into signing retraction letters P17, P18, P20 and P22; (v) the word "advantage" in s. 2(2) of Ordinance 22 includes non-pecuniary advantage; (vi) by obtaining P17, P18, P20 and P22, and directing the police to stop the investigation on P15 and P56, the booklets which had similar contents as P14A, B and C, the appellant had obtained an 'advantage' within the meaning of Ordinance 22 in that he had saved himself from embarrassment and possible prosecution; and (vii) the appellant had committed "corrupt practice" within the meaning of s. 2(2) of Ordinance 22. The facts further showed that the appellant, when asked by the court to mitigate, had not done so. In the circumstances, the learned trial judge sentenced the appellant to imprisonment for a term of six years on each of the charges.

The appellant appealed and argued *inter alia* that: (i) it was an abuse of process to charge him under Ordinance 22 as the Lower House of Parliament had already passed a resolution to annul the ordinance; (ii) the amendment to the charges was unfair; (iii) "other advantage" in s. 2(2) of Ordinance 22 should be given a restrictive interpretation and limited to 'advantage' capable of having monetary value; (iv) the approach taken by the learned judge on the issue of credibility of witnesses was wrong, as the evidence of a witness ought to be tested against the "objective facts" which were in the form of documents as pronounced in *Grace Shipping Inc. & Anor v. C.F. Sharp* (v) P17 and P18 were written by Ummi and Azizan voluntarily; (vi) the appellant had only "requested" PW1 and PW11 to investigate, but even if retraction was asked for, it was perfectly proper and legitimate for the appellant to do so in the circumstances; (vii) the learned judge had failed to address his mind to the question of *mens rea* (viii) an adverse inference ought to be drawn for the prosecution's failure to call certain material witnesses; (ix) there was a political conspiracy to get rid of the appellant, and also police conspiracy to fabricate evidence; and (x) on the authority of *Teng Beng How v. PP*, the conviction ought to be set aside as there were frequent intrusions by the learned trial judge.

Held:

Per Lamin Mohd Yunus PCA

[1] The question of bad faith on the part of the Attorney-General by mounting a prosecution under Ordinance 22 does not arise. Although a resolution had been passed by the Dewan Rakyat to annul Ordinance

22, that ordinance was yet to be laid before the Upper House, the Dewan Negara. As the ordinance has not been laid before both Houses of Parliament, the ordinance, by virtue of art. 150(3) of the Constitution, continues to have the full force of law. The Federal Constitution also gives the Attorney-General the power exercisable at his discretion "to institute, conduct or discontinue any proceedings for an offence" in any court other than Syariah Court, a native court or a court-martial, and it is not envisaged that the court shall have the inherent power to fetter that discretion.

[1a] Legitimate expectation could not arise in the matter of the proposed annulment of the law. The people that would be overjoyed by the annulment would be that small group of would be perpetrators of corrupt practice within the community. The legitimate expectations will be those of the perpetrators and that would be a consideration utterly misplaced.

[2] The learned judge was not wrong in allowing the prosecution to amend the charges. The learned judge was right in concluding that the reason for making the amendment was to avoid duplicity, and not as contended by the appellant.

[2a] The amendment in any case had not prejudiced the appellant. The prosecution on the amended charges was required to prove only as to the existence of the allegations of sexual misconduct and sodomy. The learned judge, therefore, had rightly expunged all evidence relating to the truth or otherwise of the existence of the acts that were being alleged, and in so doing, he had expunged all irrelevant and prejudicial evidence to prove the amended charges.

[3] For the purpose of the four amended charges the prosecution need only prove that: (i) the allegations were made and by whom; and (ii) it was the appellant who, while being a member of the administration, directed the special branch officers to get the letters of apology or denial for the purpose of neutralising the allegations thereby avoiding publicity.

[4] The phrase "pecuniary or other advantage" should be construed widely and must mean that the advantage is "pecuniary and other than pecuniary". That being so the advantages as mentioned in the four amended charges come within the ambit of the words "other advantage".

[5] P17, P18, P20 and P22 are not letters containing a genuine apology. When the No 2 Executive in the country suggests to an officer of a Department that something be done, it can be interpreted as a direction or instruction. PW1 and PW11 are only minor officials within the whole government set-up and it is little wonder that they felt compelled to obey the appellant. Also, on the evidence, the appellant must have a firm idea that a certain technique might be used to make Ummi and Azizan change their mind. Indeed, he could even expect a degree of force because he did ask PW1 and PW11 to "gempar" them. But, no matter what methods were used to obtain the written apologies, the appellant did get them to his own advantage.

[6] The learned judge was right in concluding that witnesses before him were credible witness. The trial judge had the benefit of first hand impression of the witnesses. He was also fully aware of the tests to be applied in ascertaining the veracity of the witnesses. On the evidence this court is not convinced that PW1 and PW11 in particular have told lies in material particulars.

[7] Since PW1, PW2, PW7 and PW11 cannot be treated as unreliable witnesses we can say that they have served the cause of the appellant, in that with P17, P18, P20 and P22 the allegations in P14B and P14C were neutralised to the advantage of the appellant so that he could save himself from prosecution and embarrassment. The learned judge, hence, had made a right finding in respect of the advantage gained.

[8] The learned trial judge may have unwittingly failed to mention the words *"mens rea"* but if he has examined every single piece of evidence relevant to the proving of a charge which he has done in this case, and in fact found it proved, that would not be fatal to the prosecution case. In the present case the prosecution has clearly proved its case.

[9] To draw an adverse inference under s. 114(g) of the Evidence Act, the appellant must show that the prosecution had an oblique motive for not calling the Inspector General of Police as a witness. The appellant had failed to do so. Similarly, for the failure to call the Hon. the Prime Minister as a witness no adverse inference should be drawn against the prosecution.

[10] There is no impediment under the Federal Constitution if the Prime Minister decides to revoke the appointment of any member of the cabinet. In other words, it does not require a political conspiracy nor does it require a conviction for a criminal offence as a ground to revoke the appointment. Therefore, the conspiracy element has no place in the matter of the revocation of the appellant's appointment. The Prime Minister has decided to terminate his appointment and he shall have no means of redress.

[11] The trial judge did not fall into error in the same manner found in *Teng Beng How* and there is no room to apply that case here. Also, the documents in the instant case cannot be placed on the same footing as commercial documents communicated between one party to the other for the purpose of concluding a business transaction as in *Grace Shipping* case. Here, some of the documents were obtained from a "turning-over" process. They cannot serve as "objective facts" and therefore the observation in *Grace Shipping* case cannot be applied.

[12] The appellant had refused to make a plea in mitigation and the learned trial judge "had to carry out the sentencing exercise only on the material available before" him. In view of the standing and position of the appelant, we agree with the learned judge in his judgment appearing from pp. 385-389. The appeal on sentence is also dismissed.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu, bekas Timbalan Perdana Menteri dan Menteri Kewangan Malaysia, telah dituduh dengan empat tuduhan perbuatan rasuah di bawah s.2(1) Ordinan Darurat (Kuasa-Kuasa Perlu) No. 22 Tahun 1970 ('Ordinan 22'). Di atas keterangan, hakim perbicaraan yang bijaksana memutuskan antara lainnya bahawa: (i) perayu merupakan Timbalan Perdana Menteri dan Menteri Kewangan pada masa yang material dan adalah dengan itu merupakan seorang "ahli pentadbiran" di dalam lingkungan maksud s. 2(2) Ordinan 22; (ii) seorang bernama Azizan Abu Bakar ('Azizan') dan Ummi Hafilda ('Ummi') telah membuat dakwaan mengenai salah laku seksual dan liwat terhadap perayu melalui surat-surat P14A, B dan C; (iii) perayu telah mengarahkan PW1 dan PW11, yang merupakan pegawai-pegawai kanan Cawangan Khas, untuk mendapatkan penarikan balik dan permohonan maaf oleh Azizan dan Ummi; (iv) Azizan dan Ummi telah disoal-siasat oleh Cawangan Khas dan akibatnya, telah dipaksa menandatangani surat-surat

penarikan balik P17, P18, P20 dan P22; (v) perkataan "manfaat" dalam s. 2(2) Ordinan 22 termasuk manfaat bukan wang; (vi) dengan mendapatkan P17, P18, P20 dan P22 dan mengarahkan polis untuk menghentikan penyiasatan ke atas P15 dan P56, buku-buku kecil yang mempunyai kandungan yang sama seperti P14A, B, dan C, perayu telah memperolehi satu "manfaat" di dalam lingkungan maksud Ordinan 22 iaitu beliau telah menyelamatkan dirinya daripada malu dan kemungkinan didakwa; dan (vii) perayu telah melakukan "corrupt practice" (perbuatan rasuah) di dalam lingkungan maksud s. 2(2) Ordinan 22. Fakta-fakta selanjutnya menunjukkan bahawa perayu, apabila diminta oleh mahkamah untuk memohon keringanan hukuman, telah tidak melakukan sedemikian. Dalam keadaan tersebut, hakim perbicaraan yang bijaksana telah menjatuhkan hukuman pemenjaraan terhadap perayu bagi satu tempoh selama enam tahun atas setiap satu pertuduhan-pertuduhan tersebut.

Perayu tersebut telah merayu dan berhujah antara lainnya bahawa (i) ianya merupakan satu penyalahgunaan proses untuk mendakwa beliau di bawah Ordinan 22 kerana Dewan Rakyat telah pun meluluskan satu resolusi untuk memansuhkan ordinan tersebut; (ii) pindaan kepada pertuduhan-pertuduhan adalah tidak adil; (iii)"other advantage" (manfaat lain) dalam s. 2(2) Ordinan 22 seharusnya diberikan pentafsiran terbatas dan terhad kepada "advantage" (manfaat) yang boleh mempunyai nilai wang; (iv) pendekatan yang diambil oleh hakim yang bijaksana atas isu kebolehpercayaan saksi-saksi adalah salah, kerana keterangan seseorang saksi haruslah diuji dengan "objective facts" (fakta-fakta objektif) yang mana ialah dalam bentuk dokumen-dokumen sepertimana yang disebut dalam *Grace Shipping Inc. & Anor v. C F. Sharp*; (v) P17 dan P18 telah ditulis oleh Ummi dan Azizan secara sukarela; (vi) perayu telah hanya "meminta" PW1 dan PW11 untuk menyiasat, tetapi meskipun jika penarikan balik telah diminta, ianya adalah amat wajar dan sah bagi perayu melakukan sedemikian dalam keadaan itu; (vii) hakim yang bijaksana telah gagal untuk menumpukan pemikirannya kepada persoalan *mensa rea*; (viii) satu inferens bertentangan haruslah dibuat bagi kegagalan pihak pendakwaan untuk memanggil saksi-saksi penting yang tertentu; (ix) terdapatnya konspirasi politik untuk menghapuskan perayu, dan juga konspirasi polis untuk mereka keterangan; dan (x) atas autoriti *Teng Beng How v. PP*, pensabitan seharusnya diketepikan kerana terdapat gangguan yang kerap oleh hakim yang bijaksana.

Diputuskan:
Oleh Lamin Mohd Yunus PMR

[1] Persoalan niat jahat di pihak Peguam Negara dengan mengadakan satu pendakwaan di bawah Ordinan 22 tidak berbangkit. Walaupun satu resolusi telah diluluskan oleh Dewan Rakyat untuk memansuhkan Ordinan 22, ordinan itu masih belum dibentangkan di hadapan Dewan Negara. Oleh kerana ordinan tersebut masih belum dibentangkan di hadapan kedua-dua Dewan Parlimen, ordinan tersebut, menurut per. 150(3) Perlembagaan, terus mempunyai kuasa undang-undang sepenuhnya. Perlembagaan Persekutuan juga memberikan Peguam Negara kuasa yang boleh dilaksanakan atas budibicaranya "to institute, conduct or discontinue any proceedings for an offence" (untuk memulakan, mengendalikan atau menghentikan apa-apa prosiding bagi sesuatu kesalahan) dalam mana-mana mahkamah selain dari Mahkamah Syariah, mahkamah adat atau sebuah mahkamah tentera, dan adalah tidak dijangkakan bahawa mahkamah akan mempunyai kuasa sedia ada untuk membelenggu budibicara itu.

[1a] Harapan sah tidak boleh berbangkit dalam perkara pemansuhan undang-undang yang dicadangkan. Orang-orang yang akan bergembira dengan pemansuhan tersebut adalah terdiri daripada golongan kecil bakal pesalah perbuatan rasuah di dalam masyarakat. Jangkaan sah adalah oleh pesalah-pesalah tersebut dan itu akan merupakan satu pertimbangan yang sesungguhnya tersalah letak.

[2] Hakim yang bijaksana tidak bertindak salah dalam membenarkan pihak pendakwaan untuk meminda pertuduhan-pertuduhan. Hakim yang bijaksana telah bertindak dengan betul dalam memutuskan bahawa alasan bagi membuat pindaan tersebut adalah bagi mengelakkan penduaan, dan bukan seperti yang ditegaskan oleh perayu.

[2a] Pindaan tersebut walau apa pun tidak memudaratkan perayu. Pihak pendakwaan berdasarkan pertuduhan-pertuduhan tersebut dikehendaki membuktikan hanya berhubung dengan kewujudan dakwaan-dakwaan salah laku seksual dan liwat. Hakim yang bijaksana, dengan itu, telah dengan betulnya menghapuskan kesemua keterangan berhubung dengan kebenaran atau sebaliknya berhubung kewujudan perbuatan-perbuatan yang didakwa, dan dalam melakukan sedemikian, beliau telah menghapuskan kesemua keterangan yang tidak relevan dan memudaratkan bagi membuktikan pertuduhan-pertuduhan terpinda tersebut.

[3] Bagi tujaun empat pertuduhan-pertuduhan terpinda tersebut, pihak pendakwaan hanya perlu membuktikan bahawa (i) dakwaan-dakwaan tersebut telah dibuat dan oleh siapa; dan (ii) ianya merupakan perayu yang, ketika menjadi seorang ahli pentadbiran, telah mengarahkan pegawai-pegawai Cawangan Khas untuk mendapatkan surat-surat meminta maaf atau penafian bagi tujuan menjadikan dakwaan-dakwaan tersebut tidak berkesan dengan itu mengelak publisiti.

[4] Ungkapan "pecuniary or other advantage" (wang atau manfaat lain) seharusnya ditafsirkan dengan luas dan semestinya bermakna bahawa manfaat tersebut adalah "pecuniary and other than pecuniary" (wang dan yang selain daripada wang). Oleh kerana keadaannya sedemikian manfaat-manfaat sepertimana yang disebut dalam empat pertuduhan-pertuduhan terpinda tersebut terlingkung di dalam lingkungan perkataan "other advantage" (manfaat lain).

[5] P17, P18, P20 dan P22 bukannya surat-surat meminta maaf yang tulen. Apabila Eksekutif No. 2 di negara ini menyarankan kepada seorang pegawai sesebuah Jabatan bahawa sesuatu harus dilakukan, ianya boleh ditafsirkan sebagai satu arahan. PW1 dan PW11 adalah hanya merupakan pegawai-pegawai rendah di dalam lingkungan keseluruhan pentadbiran kerajaan dan tidak hairanlah bahawa mereka berasa terpaksa mematuhi perayu. Juga, berdasarkan keterangan perayu semestinya mempunyai satu ide yang tegas bahawa satu teknik yang tertentu mungkin digunakan untuk membuat Ummi dan azizan menukar fikiran mereka. Sesungguhnya, beliau mungkin boleh juga mengharapkan suatu tahap paksaan kerana beliau telah meminta PW1 dan PW11 supaya "gempar" mereka. Tetapi, apa cara pun yang digunakan untuk mendapatkan kenyataan memohon maaf itu, perayu telah memperolehinya demi kemanfaatannya.

[6] Hakim yang bijaksana adalah betul dalam memutuskan bahawa saksi-saksi di hadapan beliau merupakan saksi-saksi yang boleh dipercayai. Hakim perbicaraan tersebut mendapat faedah tanggapan secara langsung akan saksi-saksi tersebut. Beliau telah juga mengetahui sepenuhnya mengenai ujian-ujian yang harus dipakai dalam menentukan kebenaran saksi-saksi tersebut. Berdasarkan keterangan tersebut mahkamah ini tidak yakin bahawa PW1 dan PW11 khususnya telah bercakap bohong dalam buti-butir yang material.

[7] Oleh kerana PW1, PW2, PW7 dan PW11 tidak boleh dianggap sebagai saksi-saksi yang tidak boleh dipercayai kami boleh menyatakan bahawa mereka telah melaksanakan kausa perayu, iaitu dengan P17, P18, P20 dan P22 dakwaan-dakwaan di dalam P14B dan P14C telah dijadikan tidak berkesan demi kemanfaatan perayu supaya beliau dapat menyelamatkan dirinya sendiri daripada pendakwaan dan perasaan malu. Hakim yang bijaksana, dengan itu, telah membuat keputusan yang betul berhubung dengan manfaat yang diperolehi.

[8] Hakim yang bijaksana mungkin telah dengan tidak sengaja gagal untuk menyebut perkataan "*mens rea*" tetapi jika beliau telah memeriksa setiap satu keterangan yang relevan bagi membuktikan sesuatu tuduhan yang telah beliau lakukan dalam kes ini, dan mendapati ianya terbukti, itu tidak akan memudaratkan kes pihak pendakwaan. Dalam kes semasa ini pihak pendakwaan telah membuktikan kesnya.

[9] Untuk membuat satu inferens yang bertentangan di bawah s. 114(g) Akta Keterangan, perayu mestilah menunjukkan bahawa pihak pendakwaan mempunyai motif yang tidak jujur (oblique) kerana tidak memanggil Ketua Polis Negara sebagai seorang saksi. Perayu telah gagal melakukan sedemikian. Begitu juga, kerana gagal untuk memanggil Yang Berhormat Perdana Menteri sebagai seorang saksi maka tiada inferens bertentangan harus dibuat terhadap pihak pendakwaan.

[10] Tidak terdapat sebarang penghalang di bawah Perlembagaan Persekutuan jika Perdana Menteri memutuskan untuk membatalkan perlantikan mana-mana ahli Kabinet. Dalam erti kata lain, ianya tidak memerlukan satu konspirasi politik mahupun satu pensabitan untuk kesalahan jenayah sebagai satu alasan untuk membatalkan perlantikan tersebut. Oleh itu, unsur konspirasi tidak memainkan peranan di dalam perkara pembatalan perlantikan perayu. Perdana Menteri telah membuat keputusan untuk menamatkan perlantikan beliau dan beliau tidak mempunyai apa-apa remedi.

[11] Hakim perbicaraan tidak tersalah dengan cara yang sama seperti yang terdapat di dalam *Teng Beng How* dan tiada ruang untuk memakai kes itu di sini. Juga, dokumen-dokumen dalam kes semasa tidak boleh digunakan atas asas yang sama dengan dokumen-dokumen komersial yang disampaikan antara satu pihak dengan yang lain bagi tujuan memutuskan sesuatu transkasi perniagaan sepertimana di dalam kes *Grace Shipping*. Di sini, sebilangan daripada dokumen-dokumen tersebut telah diperolehi daripada proses "turning over". Ianya tidak boleh bertindak sebagai "objective facts" dan dengan itu pemerhatian di dalam kes *Grace Shipping* tidak boleh dipakai.

[12] Perayu telah enggan untuk membuat rayuan bagi meringankan hukuman dan hakim perbicaraan yang bijaksana terpaksa menjatuhkan hukuman hanya atas material yang terdapat di hadapan beliau. Memandangkan status dan kedudukan perayu, kami bersetuju dengan hakim yang bijaksana dalam penghakiman beliau yang terdapat daripada ms 385-389. Rayuan atas hukuman adalah juga ditolak.

[Rayuan ditolak.]

Case(s) referred to:

Arulpragasan Sundaraju v. PP [1996] 4 CLJ 597 ***(refd)***
Dr Raghubir Saran v. State of Bihar & Anor [1964] AIR (SC) 1 ***(dist)***
Eng Keok Cheng v. PP [1966] 1 MLJ 18 ***(refd)***
Grace Shipping Inc & Anor v. CF Sharp [1987] 1 MLJ 257 ***(not foll)***
Hj Abdul Ghani Ishak & Anor v. PP [1981] 2 MLJ 231 ***(refd)***
Hui Chin-Ming v. The Queen (PC) [1992] 1 TLR 34 ***(dist)***
Karpal Singh & Anor v. PP [1991] 2 CLJ 1458 ***(refd)***
Khoon Chye Hin v. PP [1961] MLJ 105 ***(refd)***
Mohamad Kassan Hassan v. PP [1950] MLJ 295 ***(dist)***
Nunis v. PP [1982] 2 MLJ 114 ***(foll)***
PP v. Dato' Hj Mohamed Muslim Hj Othman [1983] 1 MLJ 245 ***(refd)***
R v. Ministry of Agriculture Fisheries and Food ex p Hamble (Offshore) Fisheries Ltd [1995] 2 All ER 714 ***(refd)***
Teh Cheng Poh v. PP [1979] 1 MLJ 50 ***(refd)***
Teng Boon How v. PP [1993] 3 MLJ 553 ***(refd)***

Legislation referred to:

Criminal Procedure Code, ss. 28, 112, 180, 561-A
Dangerous Drugs Act 1952, s. 39B(1)(a)
Emergency (Essential Powers) Ordinance No 22 1970, s. 2(1), (2)
Evidence Act 1950, ss. 114(g), 157, 165
Federal Constitution, arts. 5(4), 43(5), 145(3), 150(1), (2B), (3), (8)(b)
Specific Relief Act 1950, s. 49

For the appellant - Raja Aziz Addruse (Aris Rizal Christopher Fernando, Gurbachan Singh, Pawancheek Merican, Sankara N Nair & Zulkifli Nordin with him); M/s SN Nair & Partners
For the respondent - Abdul Gani Patail (Azahar Mohamad, Mohd Yusof Zainal Abidin, Tun Abdul Majid Tun Hamzah, Nordin Hassan & Shamsul Sulaiman with him)

[Appeal from High Court, Kuala Lumpur; Criminal Trial No: 45-48-98 & 45-49-98]

Reported by WA Sharif

JUDGMENT

Lamin Mohd Yunus PCA:

Leading counsel for the appellant, Raja Aziz Addruse submitted before us that it was an abuse of process to charge the appellant with the offence of corrupt practice under the Emergency (Essential Powers) Ordinance No. 22, 1970 (hereafter referred to as "Ordinance 22") for the reason that the Federal Government has expressed a clear intention to have it annulled as contained in a resolution passed by the Lower House, the Dewan Rakyat on 22 October 1998. In the Dewan Rakyat that day, the then Deputy Minister in the Prime Minister's Department, YB Datuk Hj. Mohamed Nazri bin Abdul Aziz spoke thus:

> [D.R. 22.10.98 Proceedings p. 141(A)] Timbalan Menteri di Jabatan Perdana Menteri [Datuk Haji Mohamed Nazri bin Abdul Aziz]: Tuan Yang di Pertua, izinkan saya membentangkan usul pembatalan Ordinan No.22 (Kuasa-Kuasa Perlu) Dharurat, 1970. Sebagaimana Ahli-ahli Yang Berhormat sedia maklum, Akta Pencegahan Rasuah 1997 telah pun dibentangkan di Dewan ini pada tahun lepas dan telah pun mula berkuatkuasa mulai 8 Januari 1998 yang menggabungkan tiga undang-undang rasuah yang terpakai sebelum ini, iaitu:
>
> (i) Akta Pencegah Rasuah 1961;
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> (ii) Akta Badan Pencegah Rasuah 1982; dan
>
> (iii) Ordinan No. 22 (Kuasa-Kuasa Perlu) Dharurat, 1970.
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> Sehubungan dengan itu Jemaah Menteri dalam mesyuaratnya pada 13 Ogos, 1997 telah mengambil maklum nota daripada Yang Amat Berhormat Perdana Menteri bahawa Ordinan No. 22 (Kuasa-Kuasa Perlu) Dharurat, 1970 perlu dibatalkan melalui ketetapan kedua-dua Majlis Parlimen berikutan penguatkuasaan akta baru iaitu Akta Pencegahan Rasuah 1997.
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> ...
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> [D.R. Proceedings p. 141] Sehubungan dengan keputusan Jemaah Menteri pada 13 Ogos 1997 dan berkuatkuasanya Akta Pencegahan Rasuah 1997, saya ingin membentangkan di Dewan ini Usul supaya Ordinan No. 22 (Kuasa-kuasa Perlu) Dharurat 1970 dibatalkan. Tuan Yang di-Pertua, saya ingin mengusulkan.
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> [D.R. Proceedings p. 145] ... Ini ialah kerana kita membuat pembentangan usul yang ada kaitan dengan ACA. Jadi sebab itu ordinan yang lain yang tidak ada kaitan dengan ACA ini tidak dicadangkan sekali kerana sepertimana yang telah saya sebut dalam pembentangan usul tadi, iaitu apabila Akta Pencegah Rasuah 1997 yang telah dibentangkan pada tahun lepas diluluskan oleh Parlimen maka dua akta iaitu Akta Pencegah Rasuah dan Akta Badan Pencegah Rasuah lupus secara automatik tetapi Ordinan No. 22 ini tidak boleh demikian. Ianya terpaksa dibawa dalam Parlimen, dibahas dan apabila dilulus oleh kedua-dua Dewan, iaitu Dewan Rakyat dan juga senate barulah ianya boleh dilupus sebagai satu ordinan. …

(English Translation):

[D.R. 22.10.98 Proceedings p. 141(A)] Deputy Minister in the Prime Minister's Department [Datuk Haji Mohamed Nazri bin Abdul Aziz]: Tuan Yang di Pertua, allow me to table a motion to annul Ordinance No. 22, Emergency (Essential Powers) 1970. As the Honourable Members know that the Anti-Corruption Act 1997 was tabled last year in this House and came into force on 8th January, 1998 consolidating three pieces of legislation relating to corruption which had been in force prior to this namely:

(i) Prevention of Corruption Act 1961;

(ii) Anti Corruption Agency Act 1982; and

(iii) Emergency (Essential Powers) 1970, Ordinance No. 22.

In this connection, the Cabinet at its meeting on 13th August, 1997 took note of the Honourable Prime Minister's statement that it was necessary to annul Ordinance No. 22, Emergency (Essential Powers) 1970 by resolutions of both Houses of Parliament after the coming into force of the new act, the Anti-Corruption Act, 1997.

[D.R. Proceedings p. 141] Pursuant to Cabinet's decision on 13th August, 1997 and the coming into force of the Anti-Corruption Act 1997, I wish to table before this House a motion that Ordinance No. 22 Emergency (Essential Powers) 1970 be annulled. Tuan Yang di Pertua, I propose.

[D.R. Proceedings p. 145] ... This is because we are tabling a motion relating to ACA. Thus other ordinances not connected with ACA were not laid together as I have stated earlier when tabling the motion, that when the Anti-Corruption Act 1997 was tabled and passed by Parliament last year, the two acts, namely the Prevention of Corruption Act and the Anti Corruption Agency Act were automatically repealed, but not Ordinance No. 22. It has to be introduced, debated and passed by both Houses, namely the House of Representatives and the Senate, then only can it be repealed as an Ordinance. That's the reason why we did not debate the other ordinances here as we are only debating ordinances which are related to the Anti-Corruption Act 1997.

Raja Aziz further submitted that it would only be a matter of course for a second resolution to be laid before and passed by the Upper House, the Dewan Negara. It would be invidious and oppressive to subject the appellant to prosecution under a law that had ceased to exist. He asked this court to stop this abuse. In effect he was asking this court to set the appellant free from all the four charges for which he has been convicted and sentenced.

We note that to annul an ordinance promulgated under cl. (2B) of art. 150 of the Federal Constitution, cl. (3) of the said article requires that the ordinance "shall be laid before both Houses of Parliament" and it shall only cease to have effect if resolutions are passed by both Houses annulling such ordinance. Clause (3) reads:

> (3) A Proclamation of Emergency and any ordinance promulgated under Clause (2B) shall be laid before both Houses of Parliament and, if not sooner revoked, shall cease to have effect if resolutions are passed by both Houses annulling such Proclamation or ordinance, but without prejudice to anything previously done by virtue thereof or to the power of the Yang di-Pertuan Agong to issue a new Proclamation under Clause (1) or promulgate any ordinance under Clause (2B).

Ordinance 22 had however been laid before the Dewan Rakyat and the resolution to annul it was passed on the same day ie, 22 October 1998. Until today the said Ordinance has not been laid before the upper House, the Dewan Negara. The learned counsel maintained that the fact that it had not been laid before the Dewan Negara, would be of no consequence because it would only be a matter of course for the process of annulment to be completed. Clause 3 of art. 150 has been drafted in simple language and it states that a Proclamation and any Ordinance (Ordinance No. 22 is one) "shall be laid before both Houses of Parliament" and "shall cease to have effect if resolutions are passed by both Houses annulling them." To us it is a clear direction by the Federal Constitution, the supreme law of the land, that for the Ordinance to cease to have effect or to cease to operate "if" a resolution is "passed by both Houses annulling it" and we say if and only if resolutions are passed by both Houses. It cannot be otherwise. We say so because cl. 3 spells out the circumstances when such an Ordinance ceases to operate and that will only happen when resolutions have been passed by both Houses. With respect we are of the view that it is not proper for the court to anticipate what the legislature will do in the future. In this context it is indicated in the last limb of cl. 3 which states that "but without prejudice" "to the power of the Yang di-Pertuan Agong to issue a new Proclamation ... Promulgate any ordinance under cl. (2B)". In other words even after the process of annulment has been completed with the result that the Ordinance has been properly and finally annulled, that does not prevent the Yang di-Pertuan Agong from issuing another Ordinance under cl. (2B) and his decision to do so cannot be questioned by virtue of cl. (8) of art. 150. The answer to the problem in the present case is found in sub-clause (b) of cl. (8) and it reads:

(b) no court shall have jurisdiction to entertain or determine any application, question or proceeding, in whatever form, on any ground, regarding the validity of –

(i) A Proclamation under Clause (1) or of a declaration made in such Proclamation to the effect stated in Clause (1);

(ii) The continued operation of such Proclamation;

(iii) Any ordinance promulgated under Clause (2B); or

(iv) The continuation in force of any such ordinance.

It is clearly stipulated under paragraph (iv) of sub-cl. (b) above, that the court has no jurisdiction "to entertain or determine any application, question or proceeding, in whatever form, on any ground regarding the validity of the Ordinance" or "the continuation in force of any such Ordinance". Now that no resolution has been laid and passed by the Dewan Negara, Ordinance 22 must be taken to continue to have the full force of law. Whatever the reason or ground advanced or intention expressed that a resolution would as a matter of course be tabled before the Dewan Negara we will go so far as to say that the court in this country has no power even to express an opinion. In our view therefore the question of oppression or vexatiousness on the part of the Attorney-General by mounting a prosecution against the appellant for offences under Ordinance 22 does not arise. The Federal Constitution gives the Attorney-General the power exercisable **at his discretion** "to institute, conduct or discontinue any proceedings for an offence" in any court other than Syariah court, a native court or a court-martial.

Article 145(3) reads:

(3) The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

True the Attorney-General may institute criminal prosecution at his discretion, the learned counsel for the appellant submitted that the discretion can never be unfettered. However Abdul Hamid Omar LP (as he then was delivering the judgment of the Federal Court) in the case of *Karpal Singh & Anor. v. Public Prosecutor* [1991] 2 MLJ 544 at p. 548 had this to say:

Perhaps it is appropriate that we now pause to consider the constitutional consequences of relying on the English common law concept. Unlike UK, the Constitution of the Federation which is a written law is specifically declared to be the supreme law of the land. Also, it is to be noted that UK has no criminal procedure code as enacted by our legislature. For our immediate purpose we wish to refer to art. 145(3) of the Constitution which states that the Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before Syariah Court etc. … The discretion vested in the Attorney General is unfettered and cannot be challenged and substituted by that of the court's. The reasoning and logic behind such contention is well illustrated in the cases of *PP v. Lee Tin Bau1, Long bin Samat & Ors v. PP*,[8] *PP v. Datuk Harun bin Haji Idris and Ors*[9] and *Poh Cho Ching v. PP*.[10] In the circumstances, it is superfluous to reiterate the same points.

Another relevant consideration is our Criminal Procedure Code and its relationship with present English common law. The Criminal Procedure Code (Amendments and Extension) Act 1976, which came into force on 9 January 1976, is applicable to the whole of Malaysia, amending and codifying the previous separate legislations. The Code, as its name suggests was intended to be an exhaustive pronouncement of the criminal procedure. Section 5 of the Code is indicative of the principles to be applied by local courts. This section provides for English law relating to criminal procedure to be applied when there does not exist any special provision on the matter either in the Code or any other existing law. English law is applicable insofar as it does not 'conflict or be inconsistent with this Code and can be made auxiliary thereto.' The pronouncement and effect of the Code leave no lacuna under normal circumstances.

The learned counsel cited the case of *Hui Chin-Ming v. The Queen (P.C.)* [1992] 1 TLR 34 where Lord Lowery (delivering the advice of the Judicial Committee of the Privy Council) had this to say (p. 54):

The submission proceeded to say that the trial judge or the Court of Appeal (though not requested to do so) "ought to have intervened to prevent an abuse of its procedure."

The defendant supported his submission with a citation from the speech of Lord Salmon in *Reg. v. Humphrys* [1977] AA 1, 46:

I respectfully agree with my noble and learned friend, Viscount Dilhorne, that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that, as a matter of policy, it ought not to have been brought. It is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene. Fortunately, such prosecutions are hardly ever brought but the power

> of the court to prevent them is, in my view, of great constitutional importance and should be jealously preserved. For a man to be harassed and put to the expense of perhaps a long trial and then given an absolute discharge is hardly from any point of view an effective substitute for the exercise by the court of the power to which I have referred.
>
> The doctrine of abuse of process and the remedy of refusal to allow a trial to proceed are well established. As Lord Reid said in *Connelly v. Director of Public Prosecutions* [1964] AA 1254, 1296, there must always be a residual discretion to prevent anything which savours of abuse of process. The main modern authorities are *Connelly v. Director of Public Prosecutions and Reg. v. Humphrys* [1977] AC 1 and their Lordships refer to those cases for statements of principle.

But it must be remembered that *Hui Chin-Ming* does not concern the interpretation of a State Constitution. Neither does it concern an emergency legislation promulgated under a Constitution like the Federal Constitution. It is an ordinary case dealing with criminal prosecution on charges of murder. With respect, we are in agreement with the doctrine of abuse of process as expressed by the board in the circumstances of that case. In the instant case we are however faced with a different situation. We have to concern ourselves with the interpretation of the emergency provisions of the Federal Constitution in particular the status of Ordinance 22 after the passing of a resolution to annul it by the Dewan Rakyat but before the passing of another resolution by the Dewan Negara. The Constitution provides that the validity of any Proclamation or Ordinance promulgated under cls. (1) and (2B) of art. 150 or their continued existence cannot be questioned "on any ground" and "in whatever form". Clause 8(b) of the said article that denies the court the jurisdiction to determine such an issue is further prefixed by the phrase "Notwithstanding anything in this Constitution". With the strong injunction by the Constitution not to give the court jurisdiction "to entertain or determine" the issue of validity of the Ordinance all the more reason we think that it is not envisaged that the court shall have the inherent power to fetter the discretion of the Attorney-General so as to enable him to attend to any breaches of the law by any individual thereby ensuring public order and the good health of the community. The interests of the community is paramount as against that of an individual. When "the security, or the economic life, or public order in the Federation or any part thereof is threatened" a Proclamation of Emergency may be issued giving way to the promulgation of Ordinances in order to contain those threats. An Emergency is proclaimed solely in the interests of the community as a whole and not that of an individual. It cannot be denied that in order to see that an emergency situation returns to normalcy drastic steps have to be resorted to.

In 1966, the Federal Court held in *Eng Keok Cheng v. PP* [1966] 1 MLJ 18 p. 20 that:

> The true effect of Article 150 is that, subject to certain exceptions set out therein, Parliament has during an emergency, power to legislate on any subject and to any effect even if inconsistencies with articles of the Constitution (including the provisions for fundamental liberties) are involved.

Once an ordinance is promulgated its validity cannot be questioned no matter how severe its purpose is. Should there be a breach and an offence disclosed under the Ordinance after a full police investigation, we do not see how the Attorney-General can be accused of bad faith for instituting a prosecution in the circumstances. Similarly in a case which concerns the prosecution for offences under an Ordinance which has not been annulled as in the present case.

Raja Aziz further submitted that the Cabinet had made its intention clear ie, to annul the Ordinance as expressed in Parliament when laying the resolution before the Dewan Rakyat on 22 October 1998. Therefore he said that in that event, there was a legitimate expectation by the public that the Ordinance would be annulled. He cited the case of *R v. Ministry of Agriculture Fisheries and Food exparte Hamble (Offshore) Fisheries Ltd.* [1995] 2 All ER 714. It was a case in the Queen's Bench Divison where Sedley J sat to hear an application by a company called Hamble (Offshore) Fisheries Ltd. asking for a review of the decision of the Ministry of Agriculture Fisheries and Food on its change of policy in regard to trawl licence made on 11 March 1992. The learned judge dismissed the application. In support of his submission Raja Aziz cited Sedley J's words at p. 728 thus:

> What then is the legal alchemy which gives an expectation sufficient legitimacy to secure enforcement in public law? Where the expectation has been raised by a public promise made by government 'it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty,' (see *A-G of Hong Kong v. Ng Yuen Shiu* [1983] 2 All ER 346 at 351, [1983] 2 AC 629 at 638 per Lord Fraser).

With regard to the instant case Raja Aziz said that if the Cabinet has decided that the new Anti-Corruption Act 1997 is to supersede Ordinance 22 then no public interest can override it. We do not think that the doctrine of legitimate expectation operates by a simple and straightforward formula. Sedley J has given a fair insight of the doctrine and has quoted a few examples. If we may quote passages from his judgment thus:

(p. 727-728) Professor Schwarze summarises the case law of the Court of Justice as follows (pp 1134-1135):

> For the principle of the protection of legitimate expectations to be applicable, an objective basis must exist for this principle in the shape of an expectation which is worthy of protection. Because of the broad freedom of action enjoyed by the legislature, the mere existence of a legal rule is not normally a suitable basis for legitimate expectation which must be taken into account. Adequate grounds for a solid expectation can be provided on the one hand by the fact of having entered into certain obligations towards the authorities, or on the other hand by a course of conduct on the part of the authorities giving rise to specific expectations – which in certain circumstances may arise out of a commitment entered into by the authorities.

From its terms it can be seen that this is not a exhaustive formulation, but it seems to me an excellent account of the body of law relied upon by Mr. Green under this head, including *Deuka v. Einfuhr-und Vorratsstelle fur Getreide und Futtermittel Case 78/74* [1975] ECR 421.

(p. 728) ... What matters, therefore, in the common law both of the European Community and of Britain, is whether (in Professor Schwarze's words) the applicant can demonstrate 'an expectation which is worthy of protection' (p 1134). While the phrase may have lost something in what is generally an excellent translation, it pinpoints the question begged by the common law concept: what makes an expectation legitimate?

(p. 729) But where the expectation is based upon practice, the issue is more elusive. A promise is, precisely, a representation about future conduct, making it relatively straightforward to decide whether the promisor should be held to it. Practices may, but do not necessarily, have the same character. Where the material practice is generated by a policy which is itself liable to change, the practice cannot be logically expected to survive a policy change, and policy change may not be able to be withheld consistently with the statutory duties or powers under which the policy has been brought into existence.

(p. 730) Lord Diplock instanced the decision of their Lordships in *Findlay v. Secretary of State for the Home Dept* [1984] 3 All ER 801, [1985] AC 318 as an example of an expectation of the latter kind. *Findlay's* case concerned the legitimacy of a sudden change of policy by the Home Secretary which resulted in the loss by a number of life sentence prisoners of an expectation of early release on parole. Of two of them Lord Scarman, with whom the other members of the House concurred, said ([1984] 3 All ER 801 at 830, [1985] AC 318 at 338):

> They had good reason under the practice which prevailed before the adoption of the new policy to expect release much earlier than became likely after it's adoption. The doctrine of a legitimate expectation has an important place in the developing law of judicial review … It is said that the refusal to except them from the new policy was an unlawful act on the part of the Secretary of State in that his decision frustrated their expectation. But what was their legitimate expectation? Given the substance and purpose of the legislative provisions governing parole, the most that a convicted prisoner can legitimately expect is that his case will be examined individually in the light of whatever policy the Secretary of State sees fit to adopt, provided always that the adopted policy is a lawful exercise of the discretion conferred upon him by the statute. Any other view would entail the conclusion that the unfettered discretion conferred by the statute on the minister can in some cases be restricted so as to hamper, or even prevent, changes of policy. Bearing in mind the complexity of the issues which the Secretary of State has to consider and the importance of the public interest in the administration of parole, I cannot think that Parliament intended the discretion to be restricted in this way. (Lord Scarman's emphasis.)

The importance of an unfettered power to change policy was stressed by Lord Diplock in *Hughes v. Dept of Health and Social Security* [1985] AC 776 at 788. The case concerned the compulsory retirement of civil servants before the age of 65, to which it had previously been departmental policy to allow them to continue:

> But this remains the case only so long as the departmental circular announcing that administrative policy to the employees affected by it remains in force. Administrative policies may change with changing circumstances, including changes in the political complexion of governments. The liberty to make such changes is something that is inherent in our constitutional form of government. When a change in administrative policy takes place and is communicated in a departmental circular … any reasonable expectations that may have been aroused … by any previous circular are destroyed …

In this case the change in the policy was made with the view of controlling unrestricted fishing of certain species of fish within certain areas while the case before us, it concerns a legislation for the betterment of the good health of the community in particular with the view to rid of "corrupt practices" by persons holding positions in the government and rightly the Attorney-General must continue to remain vigilant for any breaches of the law. How then legitimate expectations can arise in the matter of the proposed annulment of the law. The question is who, within the community, would be overjoyed to see its annulment, the community at large or that small group the would be perpetrators of the corrupt practice. The answer is clear. The legitimate expectations will be those of the perpetrators and that would be a consideration utterly misplaced.

Raja Aziz also cited another Privy Council's case, the case of *Teh Cheng Poh v. PP* [1979] 1 MLJ 50. We repeat some of the passages of the judgment of the Board that he read to us as follows:

> (p. 55) In their Lordships' view, however the discretion whether and when to revoke a security area Proclamation is not entirely unfettered. The Proclamation is lawful because it is considered by the Yang di-Pertuan Agong to be necessary to make an area a security area ... Once he no longer considers it necessary for that particular purpose it would be an abuse of his discretion to fail to exercise his power of revocation, and to maintain the Proclamation in force for some different purpose.
>
> ... Apart from annulment by resolutions of both Houses of Parliament it can be brought to an end only by revocation by the Yang di-Pertuan Agong. If he fails to act the court has no power itself to revoke the proclamation in his stead. This, however, does not leave the courts powerless to grant to the citizen a remedy in cases in which it can be established that a failure to exercise his power of revocation would be an abuse of his discretion. Article 32(1) of the Constitution makes the Yang di-Pertuan Agong immune from any proceedings whatsoever in any court. So *mandamus* to require him to revoke the Proclamation would not lie against him; but since he is required in all executive functions to act in accordance with the advice of the Cabinet, *mandamus* could, in their Lordships' view, be sought against the members of the Cabinet requiring them to advise the Yang di-Pertuan Agong to revoke the Proclamation.

It is interesting to note that in *Teh Cheng Poh*, their Lordships were of the view that *mandamus* could issue against members of the Cabinet requiring them to advise the Yang di-Pertuan Agong to revoke the Proclamation. But no such steps were taken. Under s. 49 of the Specific Relief Act 1950 *mandamus* will not issue to require the performance of public duties. In the matter of the annulment of Ordinance 22, would there be any means by which to force the Cabinet to table a resolution to annul before the Dewan Negara in the event that either it is slow in doing so or refuses to do so. With respect, none. It is a self-defeating argument to say that it will only be a matter of course for the second resolution to be tabled. In the case of *Teh Cheng Poh* no steps to revoke the Proclamation were taken and so it remained in force. To state in no uncertain term that the discretion of the Yang di-Pertuan Agong whether and when to revoke a security area Proclamation is not entirely unfettered or that it will be an abuse of his discretion to fail to exercise his power of revocation in the context of our law is a judicial pronouncement in futility.

In the case before us we find that Ordinance 22 still remains in force and its validity cannot now be questioned.

Raja Aziz also dwelt on the phrase "by virtue thereof" found in cl. (3) of art. 150. With respect we do not think that we need spend any time on it in view of what we have said above.

Regarding the amendment of the charges, Raja Aziz conceded that the Attorney-General has the right to do so within the provisions of the Criminal Procedure Code. According to him, under the original charges the prosecution had to prove the truth of the allegations. The reason for amending the charges, he contended, was because at the end of the prosecution case, the prosecution could not prove the truth of the allegations. Under the amended charges, the prosecution maintained that the question of the truth or falsity of the allegations would not be relevant. But Raja Aziz informed the court that the prosecution had already brought in such evidence as for example that sodomy had taken place by producing a mattress with seminal stains on it supported by the chemist's testimony. The learned counsel submitted that all those would be prejudicial to the appellant and therefore unfair. After having scrutinised the charges we are in complete agreement with the learned judge below that the reason for making the amendment was to avoid duplicity and not as contended by the learned counsel for the appellant in that the prosecution at the end of its case could not prove the charges and so the application for amendment was made. To accuse the appellant of having committed sodomy for example is really an allegation of an offence having been committed and so it can be the subject of a separate charge different from the offence of corrupt practice under the Ordinance. The learned judge was not wrong in allowing the application by the prosecution to amend the charges. On the amended charges the prosecution, amongst other things was required to prove only as to the existence of the allegations of sexual misconduct and sodomy. Being in the nature of "allegations" the truth or falsity of the commission of the acts alleged is certainly not relevant and therefore no proof of one or the other would be required upon the charges being amended. The learned judge then, in our view was right in expunging all the evidence relating to such matters. By so doing the court had only to concern itself with the question as to whether the prosecution had proved the factual existence of the allegations and not the truth or otherwise of what were being alleged. Because the judge had expunged all the evidence relating to the truth or otherwise of the existence of those acts that were being alleged, the possibility of the appellant being prejudiced would be nil. The learned judge has removed the prejudicial evidence then there can be no valid claim of prejudice thereafter by the appellant. The learned counsel for the appellant argued that it was most improper to expunge evidence. A court could perhaps expunge only irrelevant remarks and he cited the case of *Dr. Raghubir Saran v. State of Bihar & Anor* [1964] AIR

(SC) 1 and quoted the words of Mudholkar J appearing at the headnotes thus:

> Every High Court as the highest court exercising criminal jurisdiction in a State has inherent power to make any order for the purpose of securing the ends of justice. This power extends to expunction or ordering expunction of irrelevant remarks made against a person who is neither a party nor a witness to the proceeding, from a judgment or order of a subordinate court, although the matter has not been brought before it in regular appeal or revision. …

However upon examining the case, there appears to be a distinction between that case and the case before us. In that case, there was the application at the appellate stage ie, before the High Court to expunge the irrelevant remarks or observations appearing in the judgment of the magistrate below on the conduct of Dr. Raghubir Saran when submitting his medical report on two accused persons. The magistrate used such words as "It is an extreme case of carelessness on the part of the Doctor concerned." The doctor applied to the High Court to have the remarks expunged under a general power of the High Court as provided in s. 561-A of the Criminal Procedure Code. The High Court dismissed the application. On appeal the Supreme Court dismissed the appeal on the ground that the observations were not irrelevant when considering the conduct of the doctor. The magistrate's remarks had nothing to do with the case against the two accused.

But the case before us concerns the trial judge's power to expunge evidence which we consider irrelevant to prove the amended charges. But the case of *Mohamad Kassan bin Hassan v. Public Prosecutor* [1950] MLJ 295 in our view cannot come in aid of the appellant's case but it does throw some light as to the effect of inadmissible/irrelevant evidence not expunged. The appellant was preferred with three charges and at the end of the prosecution case, the President of the Sessions Court held that charges were bad for duplicity and he amended them. But the inadmissible evidence to prove the amended charges still remained in the record of proceedings. The appellant was convicted on the amended charges. On appeal the High Court quashed the convictions on the ground that the improper admission of the evidence had caused a failure of justice. In the case before us, the learned judge had expunged the irrelevant evidence to prove the amended charges and he did so at the end of the case for the prosecution after having approved the amended charges on application by the prosecution but before inviting the appellant to enter his defence. He expunged the evidence in order "to ensure that this does not have a prejudicial effect in the mind of the person hearing the case." We are satisfied that the learned judge has taken the right approach and had sufficiently cautioned his mind. This was to ensure "that the accused is not prejudiced in any way by the presence of such evidence on the record."

The next point for attack by the learned counsel for appellant was on the meaning of "corrupt practice" as found in s. 2(2) of Ordinance 22 which was an ingredient of the amended charges with particular reference to the phrase "pecuniary or other advantage". He cited a number of English cases on the rules of construction. He contended that the words "other advantage" must be given a restrictive interpretation in that they must be limited to any form of advantage that is capable of having some monetary value. We are unable to agree with such construction. They are simple English words and when put together (we repeat "pecuniary or other advantage") and literally in English they must mean that the advantage is "pecuniary or other than pecuniary". In this connection we wish to quote the words of Abdul Hamid FJ (as he then was) in *Nunis v. Public Prosecutor* [1982] 2 MLJ 114 @ p. 117 thus:

> To my mind it is the clear intention of the legislature that the words "other advantage" should be given a very wide meaning covering the variety of situations depending on the facts of each case. To consider otherwise would not indeed promote or give effect to the intention of the legislature and the object underlying the provision.
>
> … To return to the point of law under consideration, I emphasise that the words "other advantage" would have to be construed widely and that other advantage need not necessarily be pecuniary in nature. My view is fortified by a passage in *Public Prosecutor v. Datuk Tan Cheng Swee & Ors.*[2] referred to in *Haji Abdul Ghani bin Ishak & Anor. v. Public Prosecutor*[3] at p. 246 where, speaking of the object of the Ordinance, it is stated as follows:
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> > We consider that our view accords with sound common sense. The Emergency (Essential Powers) Ordinance No. 22 of 1970 is enacted to widen the campaign against bribery and corruption and now makes a penal offence any practice that comes within the definition of corrupt practice in the Ordinance, which previously would have escaped the net of the Penal Code and the Prevention of Corruption Act.

Raja Azlan Shah, CJ in *Haji Abdul Ghani's* case has also said at p. 246 as follows:

> It is therefore no longer in dispute that the object of the Ordinance is wide so as to bring to book corrupt politicians and public officers who abuse their public positions or office for their pecuniary or other advantage. The use in the Ordinance of the words 'pecuniary or other advantage' is significant. The word 'other' appearing in the context of the definition is not caught by the *ejusdem generis* rule.

We do appreciate the rules of construction as enunciated in the various cases cited by the learned counsel for the appellant Raja Aziz. Nunis applied for leave to refer a question of law to the Federal Court. The

question of law was simply on the construction of the words "or other advantage" appearing in s. 2(2) of Ordinance 22. Though the application was dismissed on the ground that it was not a question of law of public interest but the matter of construction in respect of those words as given by Abdul Hamid FJ (as he then was) must be considered as settled especially in the light of their having been approved as expressed by Raja Azlan Shah CJ (Malaya) (as His Royal Highness then was when delivering the judgment of the Federal Court dismissing Nunis' application) in the following words:

> (p. 118) The learned judge construed the words "or other advantage" widely having in mind two decisions of this court, namely: (1) *Public Prosecutor v. Datuk Tan Cheng Swee & Ors.*[2] and (2) *Haji Abdul Ghani bin Ishak & Anor. v. Public Prosecutor*[3]. We reproduce two passages from his judgment which we consider as apt and correct:
>
> > There is to my mind no mystery in the word 'advantage'. The expression is to be construed widely to include a benefit or gain of some kind other than pecuniary. …

For the above reasons we are satisfied that the advantages as mentioned in all the four amended charges come within the ambit of the words "other advantage".

It was however argued before us that the advantage as described in the first and the third charges with the words "to save yourself from embarrassment" cannot be supported by evidence even assuming that the advantage need not be "pecuniary" in nature. With respect we do not agree. We are of the view that the trial judge has made the right finding. (See Appeal Record Jilid 3 pp. 207-219). We see no reason to say anything more.

The next major area for attack by the appellant's counsels was the issue of credibility of witnesses for the prosecution. The learned judge below spent some time scrutinising the evidence of material witnesses for the prosecution including their demeanour. They appear from p. 97 to p. 132 of his grounds of judgment (see Appeal Record, Jilid 3). One of the most important witnesses, if not the most important is PW1 (Dato Mohd. Said Awang). Raja Aziz submitted that his evidence was completely demolished after cross-examination. We are unable to agree. We think the learned judge below has sufficiently dealt with his evidence in cross-examination which appears from p. 99 to p. 104 of his grounds of judgment (Jilid 3 Appeal Record). Before he came to the conclusion that PW1 was a credible witness he had also cautioned his mind when he said (p. 104):

> He has withstood lengthy and vigorous cross-examination though I am aware that the fact that a person is unshaken in cross-examination is **not** an acid test of his credibility.

PW1 was accused of shifting or changing his position. He was being inconsistent. It was submitted that he should be treated as unreliable. We have read the evidence and we agree with the way the learned trial judge examined it. He said (at p. 102 grounds of judgment):

> The general tenor of his evidence was that though he was not sure of the existence of the second report the probabilities are that there was none. … It is in my view that the manner in which Dato Mohd Said answered the questions on both instances did not give me the impression that he was being evasive or was changing his position. He was just not sure of the reports.

Raja Aziz was critical of the approach taken by the learned judge below in assessing the credibility of a witness. He contended that the evidence of a witness must be tested against the "objective facts" which were in the form of documents. He cited the observations of Lord Goff of Chieveley in the case of *Grace Shipping Inc. & Anor. v. C.F. Sharp* [1987] 1 MLJ 257 @ 265 thus:

> That is indeed the case. And it is not to be forgotten that, in the present case, the judge was faced with the task of assessing the evidence of witnesses about telephone conversations which had taken place over five years before. In such a case, memories may very well be unreliable; and it is of crucial importance for the judge to have regard to the contemporary documents and to the overall probabilities. In this connection, their Lordships wish to endorse a passage from a judgment of one of their number in *Armagas Ltd. v. Mundogas S.A. (The Ocean Frost)*[(2)], when he said at p. 57:
>
> > Speaking from my own experience, I have found it essential in cases of fraud, when considering the credibility of witnesses, always to test their veracity by reference to the objective facts proved independently of their testimony, in particular by reference to the documents in the case, and also to pay particular regard to their motives and to the overall probabilities. It is frequently very difficult to tell whether a witness is telling the truth or not; and where there is a conflict of evidence such as there was in the present case, reference to the objective facts and documents, to the witnesses' motives, and to the overall probabilities, can be of very great assistance to a judge in ascertaining the truth.

The observations above suggest that where there is a conflict of evidence such as in that case reference to the objective facts etc. "can be of very great assistance to a judge in ascertaining the truth." As a general statement of principle we have but respect for it. It is a common sense approach. It was also the correct approach on the facts of the *Grace Shipping* case. In

that case it must be remembered that it is a commercial case involving the purchase and shipping of fertilizer and we are reminded that "in commercial cases, such as the present, there is usually a substantial body of contemporary documentary evidence." In that case the documentary evidences were in the form of telexes stating offers and counter-offers which finally crystalised into an agreement and a charter party drawn up. But not in the case before us. The documents in the instant case cannot be placed on the same footing as commercial documents communicated between one party to the other for the purpose of concluding a business transaction like those in the *Grace Shipping* case. In our case some of the documents were obtained from a "turning-over" process. They cannot serve as "objective facts" and therefore the observations in the *Grace Shipping* case cannot be applied. Raja Aziz suggested that D25 could be such a document but the first paragraph itself refers to "pengakuan bertulis" dated 18 Ogos 1997 which were really P17 and P18 and it must be remembered that they were obtained through the "turning over" process. How could that document serve as objective facts. In the present case, the trial judge has the benefit of first hand impression of the witnesses who gave evidence before him. He is fully aware of the various tests to be applied in ascertaining the veracity of witnesses. From the cases he cited we have no doubt at all that he was mentally equipped and had properly addressed his mind to the problems relating to the receipt of oral testimony of a witness. Just because we think that we should come to a finding different from that of the trial judge in regard to the evaluation of the evidence of a witness, that is not a sufficient reason to overrule the trial judge. Having scrutinised the printed words in the grounds of judgment and in the notes of proceedings we are satisfied that the trial judge has come to a correct finding.

With regard to the standard of proof, another counsel for the appellant (Encik Gurbachan Singh) contended that it should be on the basis of beyond reasonable doubt. We need only say this. The defence conceded before the trial judge that it should be governed by s. 180 of the Criminal Procedure Code as it is presently worded with the words *"prima facie"* being used. This section was amended by the Criminal Procedure Code (Amendment) Act 1997 (Act A979). This amendment came about after the Federal Court's decision in *Arulpragasan a/l Sundaraju v. PP* [1996] 4 CLJ 597; [1997] 1 MLJ 1. However the defence then argued that the words *"prima facie"*, in the absence of a definition given in the Act, must mean beyond reasonable doubt. We do not propose to deal with it as it has been sufficiently dealt with by the learned trial judge. We wish only to say that we do not agree with the submission of the learned counsel for the appellant.

The appellant counsel made so much of the exhs P17 and P18 being letters of apology from Ummi and Azizan. The thrust of his argument was that they were written on their own free will. We did ask the learned counsel that if the police had not approached them, would the letters of apology have been written. He confidently answered "Yes". But there is absolutely no evidence to that effect. No such question was put to any of those two witnesses. We are however satisfied that the two letters P17 and P18 including P20 and P22 are not letters containing a genuine apology. In other words they were not written out of their own free will. A simple question only need be asked. After sending P14B and P14C to the Hon'ble the Prime Minister, why the need for them to apologise or deny the allegations. Why did the appellant seek the aid of the police officers of the Special Branch to look for Ummi and Azizan with the view to obtain P17 and P18 from them. The police officers are officers in authority. That alone would suggest that Ummi and Azizan were not free agents. Of course one cannot ignore the turning over process. Why were they treated like criminals. What they did was making allegations against the personal conduct of the appellant. The appellant had no business to direct or ask the police to detain them. He could just at the outset either write a personal letter demanding an apology or refer the matter to a solicitor or just lodge a police report and let the legal process take care of it and bring it to its logical conclusion. One cannot say that the appellant is naive or even ignorant of the ways of the world. He was then the Deputy Prime Minister. He need not wait to be prompted or advised by the police before lodging a proper police report. And yet he called in the aid of Special Branch Officers rather than lodging a police report to attend to his own personal problems, a private matter concerning his personal conduct being the allegations in P14B and P14C.

Now regarding the police statement of Ummi and Azizan recorded under s. 112 of the CPC Encik Gurbachan Singh submitted that the prosecution should have admitted it under s. 157 of the Evidence Act to serve as corroborative evidence. This issue was dealt with by the trial judge in his grounds of judgment (see pp. 300-303 Jilid 3 Appeal Record (AR)). What was interesting and "indeed bizarre" using the words of the trial judge was what happened during the trial. When SAC Musa (PW7) was asked by the prosecution about the content of the 112 statement, Encik Gurbachan Singh objected vehemently on the ground that it was not admissible. (see p. 301 Jilid 3 A/R). The trial judge disallowed it because of the objection. The trial judge's comment reads:

> It is indeed bizarre for the Defence having objected to the admissibility of Azizan's statement earlier, to now take a diametrically different stand on the failure of the prosecution to produce it.

Before us Encik Gurbachan Singh submitted that the 112 statement should have been admitted for the same reason namely to serve as corroboration or if not for consistency. The trial judge disallowed the question from the prosecution whose intention was to admit the content of the statement. It was disallowed, because Encik Gurbachan Singh objected. Now before us Encik Gurbachan Singh has the audacity to ask us to draw an adverse inference against the respondent (prosecution) in favour of the appellant for the failure by the prosecution to produce it. It was he who objected its production and when the court rightly or wrongly ruled in his favour he now asks us to draw an adverse inference against the prosecution. To put it mildly it was a submission unheard of. Of course it is inconsistent and unethical. We are shocked. There may even be a case for contempt. We do not think that we should be on his side. However under s. 157 of the Evidence Act, it is entirely for the prosecution to decide whether to use the 112 statement or not. Since it was the prosecution who attempted to use it and it was aborted by the trial's judge's ruling it is most improper to draw an adverse inference against the prosecution at this stage (appellate). For one thing it was the court which prevented its production in court and not because of the refusal to produce by the prosecution. On the other hand, learned counsel could not insist its production before us for he had to show that the learned judge's ruling was legally wrong.

Encik Gurbachan Singh submitted that it was rather mysterious in regard to the word "requested" used by PW1 and then PW1 interpreted it to mean "directions and instructions." To us there was no mystery in this. When the No. 2 Executive in the country suggests to an officer of a Department that something be done, it can easily be interpreted as a direction or instruction because the officer is expected to report back as he will be asked about it when next he sees him. How else that "request" be interpreted. We would like to say this in clear terms that even when the head of a department wants something to be done by a subordinate of his he need only say "I suggest you do this or that." It will be taken as a direction or instruction. A "request" is certainly a stronger word than a "suggestion". In the words of PW1 thus "This is because he was then the DPM and not an ordinary person. Because of that I felt compelled to do it." We do not think the counsel's submission or rather complaint deserves any further discussion.

Next was the complaint by the counsel about the length of detention in that there was no evidence from PW1 and PW11 that the appellant directed that Ummi and Azizan were not to be detained for more than 24 hours. The only evidence was that the appellant did not want them to be detained "for long". "Not for long" how long that can be. That again could be a matter of their own interpretation assuming that no exact time was expressed by the appellant. When a person is arrested and detained for more than 24 hours, it is required that he be produced before a magistrate "without unreasonable delay" and in any case within 24 hours. That is a constitutional requirement or rather a right of an arrested person as provided for under art. 5(4) of the Federal Constitution. Clause (4) reads:

> (4) Where a person is arrested and not released he shall without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey) be produced before a magistrate and shall not be further detained in custody without the magistrate's authority:
>
> Provided that this Clause shall not apply to the arrest or detention of any person under the existing law relating to restricted residence, and all the provisions of this Clause shall be deemed to have been an integral part of this Article as from Merdeka Day:
>
> Provided further that in its application to a person, other than a citizen, who is arrested or detained under the law relating to immigration, this Clause shall be read as if there were substituted for the words "without unreasonable delay, and in any case within twenty-four hours (excluding the time of any necessary journey)" the words "within fourteen days":
>
> And provided further that in the case of an arrest for an offence which is triable by a Syariah court, references in this Clause to a magistrate shall be construed as including references to a judge of a Syariah court.

The procedure to effect arrest is laid down in s. 28 of the Criminal Procedure Code and it reads:

> 28. How person arrested is to be dealt with and detention for more than twenty-four hours
>
> (i) A police officer making an arrest without a warrant shall without unnecessary delay and subject to the provisions herein as to bail or previous release take or send the person arrested before a Magistrate's Court.
>
> (ii) No police officer shall detain in custody a person arrested without a warrant for a longer period than under all the circumstances of the case is reasonable.

(iii) Such period shall not in the absence or after the expiry of a special order of a Magistrate under section 117 exceed twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

That is the first principle in the mind of a police officer each time he makes an arrest. If they had to be produced before a magistrate then of course there will be publicity. Not only that, reasons for the detention or arrest would be known and publicised. Those problems could have been in their mind for publicity was to be avoided at all costs, that being a term of the appellant's request. For breaching that term by qualifying the detention to be within 24 hours PW1 and PW11 ought not to be treated as unreliable witnesses. On the contrary it was a favour done in the appellant's interests. That was, as we have said, on the assumption that the appellant never stipulated the time being not more than 24 hours. But from the analysis of the evidence by the learned judge below, he concluded that the stipulated time came from the appellant himself. (see p. 348 of G/J Jilid 3 A/R). We agree.

The next complaint was that the learned counsel submitted that there was not a shred of evidence that the appellant abused his public position or office of Deputy Prime Minister or Minister of Finance. If there was "any vagueness, ambiguity or doubt of having abused his public position" the counsel asked that the doubt be resolved in his favour. To us there was no doubt whatsoever. When PW1 said: (at p. 74 Jilid 1 A/R) "This is because he was then the DPM and not any ordinary person. Because of that I felt compelled to do it." That is a sufficient pointer. On the morning of 11 August 1997 at about 9am. PW1 went to appellant's office for a scheduled meeting with him. PW1 gave a briefing to him on a threat by a Syiah Group as requested by him. After that the appellant asked him (PW1) to see him alone. (see p.24 Jilid 1 A/R). It was then the "request" was made. Is the counsel suggesting that after he had finished dealing with official matters the appellant was then in the capacity of a private person and so there was no question of abuse of public position. If he were at that time not in the government but an ordinary citizen walking the street, would he have the courage or could he have the opportunity or be given the opportunity to see the Director of the Special Branch and to ask him to attend to his personal problem such as an allegation by another private person of immoral conduct against him. If it did happen, there must be something wrong with the system. Or was the counsel expecting the appellant to say to PW1 after the briefing "Dato', I am now a private person, I want to speak to you on some personal matter." PW1 would probably say to himself "Is he all right. Can he now change into a private

person and become DPM again later?" This is merely to illustrate a point that the word "capacity" found in s. 2(2) of Ordinance 22 for the definition of "corrupt practice" does not change its character notwithstanding that "any act" be it official or private. The learned trial judge was right in his interpretation in regard to the definition of "corrupt practice."

The learned counsel made a lengthy submission to show that PW1 and PW11 were not reliable witnesses. We do not propose to comment on every piece of evidence he has picked up to support his submission. It must be remembered that this is a case where a Deputy Prime Minister is facing allegations of immoral conduct and being a homosexual. In his attempt to avoid publicity and proceedings in a court of law he sought the aid of police officers from the Special Branch who felt they were obliged to assist. Now that the same man who was once a Deputy Prime Minister is being tried for offences of corrupt practice, the same police officers are being accused of having concocted or fabricated evidence against the accused in order to save their own skin. In such a case in the course of sieving the evidence in order to separate the woods from the trees, it does not necessarily follow that every word said by them is suspect. By stature, in comparison with the appellant, PW1 and PW11 are only minor officials within the whole government set-up. The appellant was the DPM, a member of the administration, the Executive and an arm of the government. The police force, in law is only an agency of the government. PW1 and PW11 are components of that agency. Little wonder when PW1 was cross-examined he submissively answered that the appellant was the DPM and not an ordinary person. He felt compelled to obey his direction. Must they now be accused of having concocted evidence and be condemned as unreliable witnesses. From the sum total of their evidence, we are not convinced that they have told lies on material particulars. May be they are guilty for obeying unlawful "superior orders" because of their failure to assert their professionalism. But that does not mean they were telling lies. The whole blame is now put on those police officers for helping him. It does give us the impression from the submission that whatever 'wrong' or unlawful methods or action taken by those Special Branch Officers like the turning over process, the appellant seems to be saying that they were not part of his "request" or "direction". He had nothing to do with it. If punishment had to be meted out, it is them (the special branch officers) who should be punished and not "I" (the appellant). The appellant seems to be saying "I only asked them to investigate". But from the evidence of the prosecution he also did ask them to look for Ummi and Azizan and to detain and to get them to apologise or to deny in writing their allegations against him. He did ask them to "gempar". It was to be part of the interrogation process. No matter what methods were used to obtain

the written apologies, the appellant did get them and of course to his own advantage and therefore he must also be answerable for the action taken. One may ask whether it is fair to make the appellant answerable for the turning over process. Perhaps to answer that we may first ask the question "Were PW1 and PW11 crossed-examined as to whether the appellant has specifically requested PW1 and PW11 to apply the turning-over or neutralisation process in order to extract an apology or denial in writing?" PW1 was not cross-examined on this point. But the answers from the cross-examination of PW11 do throw some light on it. The cross-examination went as follows:

(p. 198 Jilid 1 A/R)

Q: I put it to you that accused never directed you or SP1 to do anything but merely requested SP1 to conduct a thorough investigation into this case.

A. Kami diarah untuk mengesan Ummi dan Azizan dan mendapatkan maklumat-maklumat daripada mereka. I do not agree that he merely requested us as suggested.

(p. 204 Jilid 1 A/R)

Q: I put it to you that accused only requested you to investigate fully.

A: Tertuduh mengarahkan kami untuk mengesan Ummi dan Azizan dan mendapatkan maklumat-malumat kenapa mereka membuat dakwaan-dakwaan dan bukan to investigate fully. Saya setuju untuk dapatkan maklumat-maklumat. Itu mestilah melalui siasatan. Sebelum kita mendapat maklumat tertuduh dinasihatkan membuat laporan polis. Dan tangkapan dibuat. Soalsiasat dijalankan. Barulah kita mendapat maklumat-maklumat. Saya setuju bahawa dari masa ke semasa Cawangan Khas dipanggil oleh tertuduh untuk mentaklimatkan perkembangan siasatan yang dijalankan dan maklumat-maklumat yang didapati.

(p. 205 Jilid 1 A/R)

A: ... Semasa kita menjalankan soalsiasat terhadap Ummi dan Azizan tertuduh telahpun memberi arahan kepada saya dan SP1 supaya Ummi dan Azizan membuat surat penafian ke atas dakwaan-dakwaan yang terdapat di ID14 terhadap tertuduh. Saya ta' setuju ini ta' betul.

Q: I put it to you that only after the SB briefed accused and said that they have investigated and found the allegations to be untrue and that it involved a political conspiracy against him and Ummi and Azizan were prepared to retract their allegations that the accused requested for the retraction.

A: Sebelum kita memberi taklimat kepada tertuduh tentang pendirian Ummi dan Azizan tertuduh telah menyuruh kita membuat **sesuatu** (turning over and neutralisation) supaya mereka menarik balik dakwaan-dakwaan. Selepas kita berjaya meneutralisekan Ummi dan Azizan barulah kita taklimatkan tertuduh bahawa Ummi dan Azizan menukarkan pendirian mereka. Kemudian tertuduh telahpun mengarah saya dan SP1 untuk mendapat surat mohon maaf.

A: Apa yang tertuduh menyuruh SB buat terhadap Ummi dan Azizan untuk mereka menarik balik dan menafikan semua dakwaan terhadap tertuduh.

(p. 206 Jilid 1 A/R)

A: ... The accused asked us to do **something** for them to retract their allegation. He did not make specific reference to the technique of turn over and neutralisation. Earlier I said yes to the question due to a mistake. Tidak benar bahawa tertuduh tidak meminta **sesuatu** dilakukan supaya Ummi dan Azizan mengubah pendirian mereka.

PW11 did however say that "He (the appellant) did not make specific reference to the technique of turn over and neutralisation". But at page 205 PW11 did say in Malay thus: "... tertuduh telah menyuruh kita membuat **sesuatu** ... Supaya mereka menarik balik dakwaan-dakwaan". He repeated in English thus (p. 205/206) "The accused asked us to do **something** for them to retract their allegation ...". He used the Malay word "sesuatu" and repeated it with a correct translation by using the word "something". After reading through the whole cross-examination of PW11, we are convinced that he had a fair idea that certain technique was used or could be used or at least he expected certain device or mode of persuasion to be used in order to make Ummi and Azizan change their mind. He could even expect a degree of force because the appellant did ask PW1 and PW11 to "gempar" them. He cannot now say that "request" was only to investigate deeply and thoroughly. In his written submission Encik Bachan Singh said that "... even assuming for the sake of argument that retraction were asked for, it is perfectly proper and legitimate for a complainant against whom serious allegations are made, to in law demand retraction and even apology." If that be the case, the appellant need not seek the aid of special branch officers who not only had to run up and down to him several times to brief and to report to him and also to look for Ummi and Azizan. And when the appellant was charged, those same special branch officers after having helped the appellant upon "request" or "direction" from the appellant himself, those same special branch officers were told that what they had done was wrong in law because it was done out of their normal call of duty and therefore disciplinary action should be taken against them. Indeed after following the appellant's instruction they were treated as accomplices in law. Those could have been avoided if the appellant through a solicitor had written a letter of demand for an apology or straightaway lodged a police report leaving it entirely to the C.I.D. But he did not do any of those for fear of publicity or action in court. He rather opted for a hard line of approach by engaging the services of special branch officers hoping as we see it for a swift and quiet solution. Holding the post of No. 2 Executive in the country would we be wrong

in suggesting that he must have realised that what he did for example by getting the services of special branch officers to resolve his personal problem the way it was done was legally wrong. Now the question is why did he take such a drastic step. What was really his state of mind then? Was it simply to avoid publicity or to avoid for the matter not to go to court because he knew that all the allegations were true and so he must resort to some swift action to nib the allegations in the bud? Of course for the purpose of the trial and the present appeal the court is not concerned with the truth or falsity of the allegations. However notwithstanding, we are inclined to think that there is a high degree of probability that the allegations in P14B and P14C were true for the following reasons. P14B describes in minute detail the appellant's involvement with Shamsidar, dates and time given as to his movement. P14C is an admission of having been sodomised. We find it difficult to believe for a person to admit in writing and the admission is sent to the Prime Minister unless it is true. Also the turning over process took hours in particular with Ummi pertaining to P14B. Even for the Kenyataan Umum it took from 10.30am to 3pm to persuade (see p. 128 Jilid 1 A/R) with the long hours (at odd hours too and without sleep) with gempar thrown in, Ummi and Azizan cannot be, as we have said free agents.

Now the next issue proximate to the happenings described above, is the allegation against the prosecution for having fabricated evidence in view of the defence's condemnation of PW1 and PW11 being unreliable witnesses. Could all those actions have been concocted namely the engaging of the special branch officers in particular PW1 and PW11, the effort to look for Ummi and Azizan followed with their detention resulting in the production of such documents as P17, P18, P20 and P22. It must first be remembered that during cross-examination of PW1 and PW11 there was no denial of having "requested" or shall we say having obtained the services of the special branch officers. There was no denial of the investigation being "requested" for, conducted by those special branch officers. Nor was there a denial during cross-examination of those two witnesses of the existence of the documents namely P17, P18, P20 and P22. (In fact the appellant accepted them though he was not very pleased with the content of P18.) Regarding the technique of turning over and neutralisation used to extract those written apologies or denials, we have made our finding proceeding from the request to do "something" (sesuatu) coupled with the use of "gempar". We are more than satisfied that those that have taken place were not as a result of fabrication.

PW2 and PW7 were involved in the interrogation team which "successfully" turned over Ummi and Azizan. PW2's evidence was not seriously challenged by the defence. In fact there was not the kind of challenge that could treat him as an unreliable witness and his evidence be rejected. Most of the time he was merely allowed to relate his side of the story relating to the turning over process by the interrogation team. As for PW7, there was a more stringent cross-examination partly we think the purpose was to treat him as an unreliable witness but more particularly to get PW7 to admit that Azizan's allegations in P14C were false.

Since we are satisfied that PW1, PW2, PW7 and PW11 cannot be treated as unreliable witnesses we can say that they have served the cause of the appellant in that with P17,P18, P20 and P22 the allegations in P14B and P14C were neutralised to the advantage of the appellant so that he could save himself from prosecution and embarrassment.

Apart from what we have said above, we wish to say that we are in agreement with the analysis and finding by the trial judge in respect of the evidence of those witnesses.

Dato' Azahar in reply to the submission of the appellant's counsel to the effect that the learned judge below failed to address his mind to the question of *mens rea* cited the case of *PP v. Dato Haji Mohamed Muslim b. Hj. Othman* [1983] 1 MLJ 245 where Hashim Yeop Sani J (as he then was) @ 249 said:

> Now the question of *mens rea*. I need only say that *mens rea* is necessary in every criminal offence save those which the legislature thought fit to expressly exclude. But *mens rea* can be proved in diverse ways. Here *mens rea* is proved if the accused knew or ought to have known of the conflict between his public duty as member of the Exco and his private interest in the approval of the application.

The accused in that case was also charged with offence of "corrupt practice" as defined in s. 2(2) of Ordinance 22. The accused was a member of the Executive Council of the State of Kedah. He was present at the meeting of the Executive Council which deliberated and approved his application for a piece of land. There was obviously a conflict of interests between his official duty and his private interest. The learned judge said his mere presence was sufficient proof that there had been a conflict between the accused's official duties and his personal interest or advantage. There was no question of the accused of not being aware of the irregularity. That shows his criminal intent. In the instant appeal, the appellant has abused his public position by soliciting the aid of the special branch officers to resolve his personal problems. In this case he managed

to obtain P18, P20, P22 through a form of interrogation by the special branch officers which we consider improper and even unlawful as it was not part of their work to extract an apology or denial in order to neutralise the allegations of immoral conduct on the part of the appellant. The appellant resorted to such improper and unlawful measures merely for the purpose of saving himself from embarrassment and protecting himself from criminal action thereby at the same time preserving his public image and position. Do we have to spell out the *mens rea* present in the appellant's mind? One of the appellant's counsels did question as to "how wide is wide" when submitting on the meaning of "other advantage" so that even any innocent act may be caught by the definition and in the final analysis there may not be present the element of *mens rea* which is essential in any criminal act. It does not become part of the hearing of an appeal to indulge in an exercise whereby the court must spell out every conconceivable circumstance whether criminal intent is present or not. The learned trial judge may have unwittingly failed to mention the words *"mens rea"* but if he has examined every single piece of evidence relevant to the proving of a charge which he has done in this case, and in fact found it proved that would not be fatal in our view to the prosecution case. In the present case, we are not convinced with the submission of the appellant's counsel on this issue. We are more than satisfied that the prosecution has proved its case.

Appellant's counsel also submitted that at a certain stage the investigation papers were submitted to the Attorney-General with the recommendation to NFA the case. That was after having extracted P17, P18, P20 and P22 from Ummi and Azizan. According to the learned counsel that the fact of making the recommendation was a clear sign that it had the appearance of neutralising P14A, P14B and P14C and we think that was also the advantage gained by the appellant. The question as to why the Attorney-General still proceeded notwithstanding the recommendation to NFA the case, and in fact he did agree to do so, for our part there is nothing more to be said as it is within his discretion to do so.

The appellant's counsel (Encik Gurbachan Singh) asked this court to draw an adverse inference under s. 114(g) of the Evidence Act for the failure on the part of the prosecution to call the Inspector-General of Police as he was involved in giving instructions to his officers to look into the allegations made by Ummi and Azizan including their background. For the purpose of the four amended charges in this appeal the prosecution need only to prove that:

(a) the allegations were made and by whom;

(b) it was the appellant while being a member of the administration as the Deputy Prime Minister directed those special branch officers to get the letters of apology or denial for the purpose of neutralising the allegations thereby avoiding publicity.

In the whole episode the Inspector-General of Police as Head of the Police Department for the whole country he has the right to give directions or instructions and to demand that he be briefed on any issue that comes within the ambit of police jurisdiction. In the instant appeal, the directions that we are concerned with are those given by the appellant and the results as a consequence of those directions which would work to his advantage. No doubt the I.G.P. had been briefed and he too had given instructions. They are not material or relevant for the purpose of proving the four amended charges. It was the appellant who had played a more direct and active role for he had to see that his personal interests were served. To ask this court to draw an adverse inference under s. 114(g) of the Evidence Act, the appellant must show that the prosecution had an oblique motive for not calling the I.G.P. as a witness (see *Khoon Chye Hin v. PP* [1961] MLJ 105). It may be argued that the fact that the Attorney-General had agreed to NFA this case as recommended and then afterwards proceeded to charge the appellant in itself shows that there was an oblique motive. We do not agree for the Attorney-General had complete discretion. He would have made a restudy with new evidence and he therefore decided to charge. We are therefore of the view that the appellant had failed to do so. Similarly for the failure on the part of the prosecution to call the Hon'ble the Prime Minister as a witness, no adverse inference should be drawn against the prosecution. It was also submitted that the Hon'ble Prime Minister had made a press statement to the effect that the matter be closed and for that he ought to have been called at least as a rebuttal witness. With the greatest of respect the power to decide whether to proceed or not in view of the evidence acquired after a full investigation is with the A.G. To still proceed to call for a rebuttal evidence would be a sheer waste of time. As a matter of fact, correctly it would have been for the defence (the appellant) to call the Hon'ble the Prime Minister as a defence witness with the view to create a reasonable doubt on the case for the prosecution. But in view of the ingredients of the amended charges, we have grave doubts as to whether the evidence of the Hon'ble the Prime Minister can assist the defence. However it is not for this court to conjecture.

Political conspiracy and police conspiracy were very important to the defence Raja Aziz submitted before us. From the record of appeal, we notice the same submission was made with equal force. Raja Aziz contended that there was a political conspiracy to get rid of the appellant

while the whole purpose of showing that there was police conspiracy was that the prosecution against the appellant was commenced with ill-intention suggesting that there had been fabrication of evidence in the process. The learned judge below dealt with the two issues in his grounds of judgment (see pp. 254 to 259 of Jilid 3 A/R). If we may repeat Raja Aziz's submission appearing on p. 255 of Jilid 3 A/R thus:

> This is to establish conspiracy to show change of attitude of the authorities towards the accused. It was one of the reasons of the conspiracy to get rid of him. The conspiracy issue is very important in this case because the credibility of the police comes into question. Why I say that the issue of conspiracy and credibility of the police are important is because of the evident change in the attitude of PW1 and PW11 as well as PW13 when we compare the time at September 1997 and later on. One can see a major change. Nobody has explained the change.

May we say from the outset that there is no impediment under the Federal Constitution if the Prime Minister decides to revoke the appointment of any member of the Cabinet. In other words it does not require a political conspiracy nor does it require a conviction for a criminal offence as a ground to revoke the appointment. Clause (5) of art. 43 reads:

> (5) Subject to Clause (4), Ministers other than the Prime Minister shall hold office during the pleasure of the Yang di-Pertuan Agong, unless the appointment of any Minister shall have been revoked by the Yang di-Pertuan Agong on the advice of the Prime Minister but any Minister may resign his office.

Under the above provision a Minister other than the Prime Minister holds office during the pleasure of the Yang di-Pertuan Agong. In factual terms, he holds office at the pleasure of the Prime Minister. This means that the Prime Minister may revoke his appointment at any time. Of course formality demands that the revocation of his appointment shall be acted upon by the Yang di-Pertuan Agong "on the advice of the Prime Minister". The Yang di-Pertuan Agong must act on such advice. Therefore the conspiracy element has no place in the matter of the revocation of the appellant's appointment. The Prime Minister has decided to terminate his appointment and he shall have no means of redress. His immediate problem was to answer the charges with the offence of "corrupt practice" which is unrelated to the question of the revocation of his appointment.

Regarding his trial which is on appeal before us on the amended four charges, the appellant through his counsels has been making allegations against the prosecution that there has been police conspiracy against the appellant by manufacturing fabricated evidence with the purpose, as we understand it, to have him convicted. We have however commented on the

subject and so did the trial judge. However directly on the subject of police conspiracy the learned judge has dealt with it in his grounds of judgment and it appears on pp. 256-259. When the learned judge asked whether the issue of police conspiracy was put to the police witnesses, Raja Aziz argued partly to the effect that "what was in order in 1997 September became in 1998 not in order all of a sudden. That goes to credibility." To that the Attorney-General gave an explanation *inter alia* that in 1997 there was the turning-over process carried out by the special branch officers unknown to the CID officers who had to carry out a full investigation in 1998 and only then the turning-over process carried out by the special branch officers in 1997 was discovered. Before us Raja Aziz submitted that what was overlooked in the Attorney-General's explanation was that the "Investigation Officers in 1997 were the same officers as the Investigation Officers for 1998" suggesting that there was the presence of conspiracy. They may very well be the same officers. But PW1 and PW11 were special branch (S.B.) officers while PW13 was a CID officer. We do appreciate that the S.B. officers and CID officers operate differently meaning each side adopts an approach different from the other and each side has no knowledge of what the other is doing. This is clearly illustrated from the evidence of PW13 and as an example we wish to quote a part of his evidence appearing on pp. 283-284 of Jilid 1 A/R as follows:

> Saya mencadangkan kes ini untuk di NFA kerana dokumen P17, ID18, P20, ID21, ID22 telah mempengaruhi saya untuk menutup kes tersebut. Pada masa itu saya tidak mengetahui cara bagaimana dokumen-dokumen ini telah disediakan oleh Azizan atau pun Ummi. Pada masa itu saya juga tidak mengetahui yang pihak S.B. telah terlibat di dalam penyediaan dokumen-dokumen tersebut iaitu P17, ID18, P20, ID2221 dan ID22 ...
>
> Semasa saya menjalankan siasatan terhadap Buku 50 Dalil saya telah menemuduga Dato Mohd. Said Awang (SP1), Dato Amir Junus, DSP Abdul Aziz dan ACP Mazlan ...
>
> Semasa saya menemuduga saksi-saksi ini saya telah diberitahu tentang penglibatan S.B. di dalam penyediaan dokumen-dokumen P17, ID18, P20, ID21 dan ID22. Mereka telah memberitahu saya perkara ini pada Ogos, 1998.

PW13 may have known of the existence of P17, ID18, P20,ID21 and ID22 in early September 1997 (when he went to see the Attorney-General with the recommendation to NFA the case) but he only came to know as to how they were obtained in August 1998. PW13 was not challenged on this issue. PW13 had said that (p. 285 Jilid 1 A/R):

> Sekiranya siasatan saya terhadap ID16, ID14A,B dan P14C adalah benar saya akan mencadangkan untuk mengambil tindakan pendakwaan terhadap tertuduh.

It would be fair to infer that it was after August 1998 with the result of a full investigation by the CID officers together with the realisation of the proper impact of the turning-over process that charges were then preferred on 5 October 1998. So the claim by Raja Aziz that the Attorney-General had overlooked the point that the same officers were the I.Os in 1997 and in 1998 suggesting that there had been a conspiracy cannot be sustained.

The other issue which became the subject of a complaint was the frequent interventions by the learned trial judge as alleged by Raja Aziz and the case of *Teng Boon How v. PP* [1993] 3 MLJ 553 was cited on the strength of which he prayed for the conviction to be set aside.

A judge is given great latitude to examine and cross-examine a witness, a power derived under s. 165 of the Evidence Act 1950 (Act 56) (Revised-1971). Section 165 reads:

> 165. **Judge's power to put questions or order production**
>
> The Judge may, in order to discover or to obtain proper proof of relevant facts, ask any question he pleases, in any form at any time, of any witness or of the parties, about any fact relevant or irrelevant; and may order the production of any document or thing; and neither the parties nor their agents shall be entitled to make any objection to any such question or order, nor, without the leave of the court, to cross-examine any witness upon any answer given in reply to any such question:
>
> Provided that:
>
> (i) the judgment must be based upon facts declared by this Act to be relevant and duly proved;
>
> (ii) this section shall not authorize any Judge to compel any witness to answer any question or to produce any document which the witness would be entitled to refuse to answer or produce under sections 121 to 131 if the question were asked or the document were called for by the adverse party; nor shall the Judge ask any question which it would be improper for any other person to ask under section 148 or 149; nor shall be dispense with the primary evidence of any document, except in the cases hereinbefore excepted.

Teng Boon How appears to have set the limits in our law and they are as recognised by the common law of England. According to *Teng Boon How* the nature of examination or cross-examination contemplated by section 165 is not examination or cross-examination of an inquisitorial nature for the purpose of entrapping an accused or of extracting from him damaging admissions upon which to build up a case against him or to supply a gap in the evidence for the prosecution especially in the case of a capital

charge. There must not be excessive interventions so as the judge falls into error in descending "into the arena of the dispute" and then allowing his judgment of the facts to be clouded by the results of his cross-examinations. In *Teng Boon How*, the cross-examination of the appellant by the court took place after he had been examined, cross-examined by the Deputy Public Prosecutor and re-examined by the defence counsel and more particularly it was upon recall by the trial judge after the appellant's re-examination was concluded (see p. 559) (The appellant was tried and convicted of trafficking in heroin under s. 39B(1)(a) of the Dangerous Drugs Act 1952). The appellant's brother and another witness (a taxi driver) were similarly dealt with by the trial judge (see pp. 559 to 561).

In the present appeal, we looked through the notes of proceedings page by page we certainly did not find the trial judge falling into error in the same manner as found in *Teng Boon How* not even anywhere close to it. We are therefore unable to accede to the learned counsel's submission with the result that there is no room to apply *Teng Boon How*.

We have carefully considered the submissions of the learned counsels for the appellant and we have expressed our views as in the above in respect of most of the points raised. We however find no valid ground to depart from the finding of the learned judge below and in the result we hereby dismiss the appeal against conviction.

With regard to sentence Encik Christopher Fernando, one of the learned counsels for the appellant submitted that the sentence handed out by the learned trial judge was grossly excessive for a number of reasons. Firstly may we observe that the counsel for the appellant in the court below did not wish to make a plea in mitigation and we fail to understand his attitude and now the learned judge is literally being accused of having failed to consider certain mitigating circumstances. In fact the learned judge made repeated requests to the counsel if he had anything to say by way of mitigation for his client. He just declined. Instead the appellant delivered a speech not in mitigation but far from it. Notwithstanding, the learned judge "had to carry out the sentencing exercise only on the material available before" him.

However learned counsel before us in his plea of mitigation made a comparison of the present case with sentences passed in previous cases. In the case of *PP v. Dato Hj. Mohamed Muslim bin Hj. Othman* [1983] 1 MLJ 245, the accused was charged with the same offence of "corrupt practice" under Ordinance 22 and sentenced to one day imprisonment and a fine of $2,000. He was a senior member of the Executive Council of the Kedah State Government and he was present during the Council's

deliberation on his application for a piece of state land for the purpose of building a dwelling house. In the case of *Hj. Abdul Ghani bin Ishak & Anor. v. PP* [1981] 2 MLJ 231, the 1st appellant (Hj. Abdul Ghani bin Ishak), was a member of Executive Council of the State of Melaka and was charged with the offence of corrupt practice under Ordinance 22. He was present in Exco's deliberation over an application for a large piece of land intended for a prawn hatchery. The application was in the name of a young girl, the niece of the 2nd appellant but a girl friend of the 1st appellant. After the application had been approved, the 1st appellant married the girl. He was sentenced to seven months imprisonment.

The learned counsel also submitted that the appellant did not gain in monetary terms. In view of the standing and position of the appellant in the present appeal, we do not think the same consideration as was given in those two earlier cases be given to the appellant. We however agree with what was said by the trial judge in his judgment appearing from pages 385-389. Accordingly the appeal against sentence is also dismissed and the sentence as passed is affirmed.